IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.K.DENESAN

WEDNESDAY, THE 11TH APRIL 2007 / 21ST CHAITHRA 1929

WP(C).No. 14455 of 2005(U)

PETITIONER:

SAJEEV. P.K., REGIONAL ARCHIVES,
ERNAKULAM, KOCHI-11.

BY ADV. SMT.P.V.ASHA

RESPONDENTS:
----

1. STATE OF KERALA REPRESENTED BY
PRINCIPAL SECRETARY TO GOVERNMENT,
FINANCE (ESTABLISHMENT-B) DEPARTMENT,
GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM.

2. THE KERALA PUBLIC SERVICE COMMISSION
REPRESENTED BY ITS SECRETARY, PATTOM,
THIRUVANANTHAPURAM-4.

***3. SHAFEEK AHAMMED C.M.,**
CHERUKARAKKAVIL HOUSE,
VARANAM P.O., ALAPPUZHA DIST.

***ADDL.R3 IS IMPLEADED AS PER ORDER DATED 25/07/2005**
IN IA NO. 10596/2005.

****4. B.SETHU, S/O. BALAKRISHNA SHARMA,**
KULAKKUZHI ILLOM,
THAKAZHY, KUTTANADU TALUK,
ALAPPUZHA DIST.

****ADDL. R3 IS IMPLEADED AS PER ORDER DATED 27/01/2006**
IN IA NO. 669/2006.

#5. SHIJU JOSE,
VELUTHEDATH
PATHIRAPPALLY P.O.,
ALAPPUZHA DIST.

6. G.JEEVAN KUMAR,
JEEVAN NIVAS, KONCHARA P.O.,
VAMBAYAM, THIRUVANANTHAPURAM DIST.

7. T. CHANDRA KUMAR,
GANGA, NADUVATH, NEMOM P.O.,
THIRUVANANTHAPURAM- 20.

#ADDL. R5 TO R7 ARE IMPLEADED AS PER ORDER DATED 26/06/2006 IN IA NO. 8537/2006.

BY ADVS. SRI.P.C.SASIDHARAN, SC, KPSC
SRI.C.P.SUDHAKARA PRASAD (SR.)
SRI.ELVIN PETER P.J. ---R3
SRI.L.GOPALAKRISHNAN POTTI --R4
SRI.V.P.SUKUMAR ---R5 TO R7
SRI.KURYAN THOMAS
GOVERNMENT PLEADER SRI. P.NANDAKUMAR

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 21/02/2007 ALONG WITH WPC NO. 13978/2005 AND CONNECTED CASES, THE COURT ON 11/04/2007 DELIVERED THE FOLLOWING:

WP(C) NO: 14455/2005

APPENDIX

PETITIONER'S EXHIBITS

EXT.P1. COPY OF THE RELEVANT PORTION OF THE NOTIFICATION DT. 2/07/2001 OF THE PSC.

EXT.P2. COPY OF THE RANKED LIST OF PSC FOR THE POST OF DIVISIONAL ACCOUNTANTS.

EXT.P3. COPY OF THE REPRESENTATION DT. 2/6/2004 BY ONE OF THE UD CLERKS.

EXT.P4. COPY OF THE COUNTER AFFIDAVIT DT. 5/10/2004 IN WPC NO. 17882/2004.

EXT.P5. COPY OF THE JUDGMENT DT. 16/3/2005 IN WPC NO. 17882/2004.

EXT.P6. COPY OF THE JUDGMENTDT. 19/4/2005 IN WA NO. 905/2005.

EXT.P7. COPY OF THE GO P NO. 123/2005./FIN DT. 16/3/2005.

EXT.P8. COPY OF THE COUNTER AFFIDAVIT DT. 5/1/2005 IN WPC NO. 35745/2004.

RESPONDENT'S EXHIBITS

EXT.R1A. COPY OF THE LETTER NO. 58251/ESTT.B2.03/FIND T. 19/4/2005.

EXT.R2A. COPY OF THE REQUISITION RECEIVED FROM THE GOVERNMENT.

True copy

tga

K.K. DENESAN, J.

= = = = = = = = = = = = = = = = = = =
W.P.(C)Nos.14455, 13978,
18518 of 2005 & 27952 OF 2006
= = = = = = = = = = = = = = = = = = =

Dated this the 11th April, 2007

J U D G M E N T

These writ petitions raise a common issue for resolution. Hence, they are disposed of together by this judgment.

W.P.(C) No. 14455, 13978 & 18518 of 2005

2. The petitioners challenge the validity of G.O. (P) No. 123/2005/Fin. dated 16-3-2005. Hence, the main question for consideration is whether the Govt. Order dated 16-3-2005 is valid and enforcible.

3. The basic facts are not in dispute.

4. Appointment of Divisional Accountants, a post included as category No. 3 in the Kerala General Service (hereinafter referred to as the Special Rules), shall be in accordance with the three methods prescribed by the Special Rules issued in G.O.(P) No. 464/Public (Rules) Department/1966 dated 28-11-1966 and published in Kerala Gazette dated 5-12-1966. Those three methods are (i) by absorption of existing emergency Divisional Accountants and on absorption of all existing Emergency Divisional Accountants, by

transfer of Junior Superintendents in the Public Works Department, the Harbour Engineering Department and the Irrigation Department (one third of the vacancies); (ii) by direct recruitment (one third of the vacancies) and (iii) by transfer from among U.D. Clerks of all departments (including Assistants Grade I of Administrative Secretariat, Finance Secretariat and office of Public Service Commission and Senior Accountants/UD Auditors of Local Fund Audit Department) and those above UD Clerks/Assistant Grade I, Senior Accountants/UD Auditors in the non-gazetted cadre.

5. Note I below the aforesaid Rule provides that appointment by direct recruitment and by transfer shall be made on the basis of a competitive and qualifying test called "The Initial Recruitment Examination for Divisional Accountants" to be conducted by the Kerala Public Service Commission. Note 2 provides that if the required number of candidates are not available to fill up the vacancies under item (iii) (by transfer of UD Clerks) above, the deficiency would be made good by direct recruitment.

6. For the past several years there has not been a single candidate who has come out qualified in the test

conducted by P.S.C. from among Junior Superintendents. Hence, the vacancies under item (i) could not be filled up, so far, on regular basis.

7. The 2nd respondent issued notification dated 2-7-2001 vide Kerala Gazette dated 24-7-2001 inviting applications for selection and appointment as Divisional Accountants from among the qualified candidates coming under all the three categories. The number of vacancies under category I was notified as 44. In respect of the other two methods, the notification stated that the vacancies had not been estimated.

8. P.S.C. published the ranked list of successful candidates on 23-2-2004. A copy of the ranked list has been produced as Ext. P2 in W.P.(C) No. 14455 of 2005. Ext. P2 has three parts, viz., Category I, Category II and Category III. As far as Category I (transfer from Junior Superintendents) is concerned, it is kept blank as none got qualified. In the 2nd part of the list (direct recruitment) 67 persons have been included in the main list and 39 persons in the supplementary list. In Category III (transfer from U.D. Clerks) 49 persons have been included in the rank list.

9. It is pertinent to note that the Special Rules do not contain any provision to meet the situation when candidates under item (i) are not available. At the same time, the Special Rules provide that in the absence of candidates under item (iii), the vacancies shall be filled up by direct recruitment.

10. Under the above circumstances, the petitioners and similarly situated persons filed representations before the Government requesting to fill up vacancies under Category I by appointing candidates under Categories II and III. Government did not take any decision on those representations. On the other hand, orders were issued promoting unqualified hands in the quota for Junior Superintendents. Hence, W.P. (C) No. 17882 of 2004 was filed before this Court praying for a direction to the respondents to fill up the vacancies of Divisional Accountants under Category I by appointing candidates included in the rank list under category III. The Government in that writ petition filed a counter affidavit stating that steps have already been initiated for amending the Special Rules to fill up the vacancies under Category I by appointing candidates under Categories II and III. In view of the

above statement in the counter affidavit, the writ petition was closed without prejudice to the contentions of the petitioners. Thereafter, a Division Bench of this Court vide Ext. P6 judgment, stipulated a time limit for bringing into existence the amended Special Rules. The relevant portion in Ext. P6 reads:

> "On our part, we do not think it will be proper to fix a dead line, but we feel that taking notice of the rights of the appellants, as projected in the writ appeal, it will be appropriate that such amendments are brought in within a maximum period of four months from today."

However, the amended Special Rules have not so far come into force. Instead, the Government issued the impugned order dated 16-3-2005 pursuant to its decision to amend the Special Rules in the following manner:

> "(i) in sub-rule (a) of rule 2, in the entries in items (i), (ii) and (iii), under the heading "Method of appointment" in column (2) against "3 Divisional Accountant" under the heading "Category" in column (1), for the words "of the vacancies", the words "of the posts in the cadre" shall be substituted.
>
> (ii) in sub-rule (a) of rule 2, the existing sentence in Note (2) under the entries in items (i), (ii) and (iii) under the heading "method of appointment" in column (2) against "3 Divisional Accountant" under the heading "Category" in column (1), shall be substituted, as follows:-
>
> "If the required number of candidates

> are not available to fill up the vacancies, to be filled up under item (i) or (iii) above, the deficiencies shall be made good by direct recruitment."

The order concludes with the sentence that necessary amendments to the relevant provisions of the Special Rules of KGS & KPWA Code shall be issued separately.

11. The objection raised by the petitioners is directed against that part of the Government Order dated 16-3-2005 which says that if the required number of candidates are not available to fill up the vacancies, under items (i) or (iii) above, the deficiency shall be made good by direct recruitment.

12. According to the petitioners, the Govt. Order dated 16-3-2005 is only an executive order or a draft rule and the same cannot amend or alter the Special Rules. The Special Rules which govern the field cannot be altered by an executive order or a draft rule. It was also contended that even assuming that the Government is competent to issue orders to meet the unforeseen contingencies, the same shall not suffer from the vice of discrimination. According to them, the distribution of the posts coming within the quota meant for Junior Superintendents under item (i) shall be apportioned equally among those coming under items

(ii) and (iii). It is therefore contended that the decision of the Government as seen from the Govt. Order dated 16-3-2005 to fill up the vacant posts under item (i) by appointing candidates who come under item (ii) only, is discriminatory and arbitrary.

13. Learned counsel for the petitioners cited the decisions of the Apex Court in ***K. Kuppusamy*** v. ***State of T.N.*** {(1998) 8 SCC 469), ***Union of India*** v. ***Anil Kumar*** {(1999) 5 SCC 743}, ***Union of India*** v. ***V. Ramakrishnan*** {(2005) 8 SCC 394} and ***R.P. Bharadwaj*** v. ***Union of India*** {(2005) 10 SCC 244} in support of the above contentions. Judgment of this Court in ***Sugathan*** v. ***Shahul Hameed*** {2006 (4) KLT 54} also was cited.

14. The 1st respondent-Government and the 2nd respondent-P.S.C. have filed separate counter affidavits. Some of the additional respondents also have filed counter affidavits. The petitioner has filed a reply affidavit.

15. The respondents in their respective counter affidavits have taken the stand that the Government have got the power to issue orders in the nature of G.O.(P) No. 123/2005/Fin. dated 16-3-2005, for, the same is neither inconsistent with the Special Rules nor

in derogation of the Special Rules. What the Government have done is to fill up a gap in the rules to meet a contingency that has already arisen and to be tackled while implementing the Special Rule which is silent about the manner in which the problem has to be solved.

16. The respondents have cited the decision of the Apex Court in ***Sant Ram Sharma*** v. ***State of Rajasthan*** {AIR 1967 S.C. 1910}, ***State of Andhra Pradesh*** v. ***Lavu Narendra Nath*** {AIR 1971 S.C. 2560}, ***M/s. Bishamber Dayal Chandra Mohan*** v. ***State of U.P.*** {AIR 1982 S.C. 33}, ***Direct Recruit Class II Engineering Officers' Association*** v. ***State of Maharashtra*** {(1990) 2 SCC 715} and ***State of J & K*** v. ***Shiv Ram Sharma*** {(1999) 3 SCC 653}. Decisions of this Court in ***Bose William*** v. ***State of Kerala*** {2002 (2) KLT 34} and ***Anitha John*** v. ***Eldhose Mathew*** {2002 (3) KLT 974} also have been cited.

17. Heard both sides.

18. The Special Rules provide that one third vacancies in the post of Divisional Accountants shall be filled up by transfer appointment of Junior Superintendents borne on the three departments

mentioned therein. The method of appointment thus laid down in the Special Rules is silent on the question as to how the said vacancies shall be filled up in case qualified persons selected by the P.S.C. are not available. One of the objects of issuing the impugned order is to fill up the above gap and to meet the contingency for which no provision is made in the Special Rules. The impugned Govt. Order therefore says that if the required number of candidates are not available to fill up the vacancies under item 1 or 3, the deficiencies shall be made good by direct recruitment.

19. It is well settled that the executive power of the State is co-extensive with its legislative power. It is also well settled that in the absence of statutory provisions executive orders validly issued will hold the field. The Apex Court in Sant Ram Sharma's case{AIR 1967 S.C. 1910} laid down the principle that though the Government cannot amend or supersede statutory rules by administrative instructions, it can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed, if the rules are silent on

any particular point. Therefore the competent Government have got the power to prescribe the eligibility criteria provided the statute has not laid down provisions to the contrary. The Constitutional Bench of the Apex Court in ***Direct Recruit Class II Engineering Officers' Association*** v. ***State of Maharashtra*** {(1990) 2 SCC 715} made it clear that a quota rule can be prescribed by executive instruction in the absence of statutory rule in that regard. This, of course, is subject to the rider that the same shall not be inconsistent with or contrary to any specific provision in the statute or the scheme of the statute.

20. This Court has followed the above statement of law in a catena of decisions. For example (See ***Bose William v. State of Kerala*** {2002 (2) KLT 34}. The following was stated in the above decision:

> "Of course, when the field is covered by a rule, there is no scope for issuing executive orders. However, the necessity to issue orders cannot be totally obviated even in a case where rules govern the field. It is settled law that a gap in the statutory provision, can be filled up by executive orders which are not inconsistent with the Rule. The executive authority can supplement the rule but not supplant."

A Division Bench of this Court in ***Anitha John v.***

Eldhose Mathew {2002 (3) KLT 974} has stated as follows:

> "We have already found that there are no Government Orders or provisions in the Kerala Education Rules which prescribe qualifications for H.S.A. (English). Instructions were issued by the Government for the first time for filling up the gap in the Rules and S. 10 of the Act empowers the Government to fix qualifications for teachers. The Director of Public Instructions also endorsed the same and issued directions to implement the Government Order. We are of the view that the policy decision of the Government cannot be interfered with by this Court after having held that it is a laudable object especially when conscious effort is made by the Government to make necessary rules and Government order was issued in that attempt to implement policy to avoid hardship as a temporary measure."

In paragraph 15 of the decision in ***Nanu v. Balan Master*** {2006 (4) KLT 702} another Division Bench of which I also was a party had occasion to deal with a similar question. The Court held as follows:

> "Neither R.45B(1) nor any other provisions in KER enumerates or even indicates what are the papers or subjects for a pass in Account Test (Lower). De hors the government orders which prescribe the syllabi, R.45B(1) will remain unworkable. It is trite that when the statutory rule is silent on any particular point, the gap can be filled up by executive instructions not inconsistent with the rules already framed. This dictum laid down by the

> Supreme Court in Sant Ram v. State of Rajasthan (AIR 1967 SC 1910) has been followed in a catena of decisions by the Apex Court and the various High Courts. Here the executive orders only supplement the Rule and do not come into conflict with R. 45B of Chap. XIV A. Hence, the argument that R. 45B of Chap. XIV A shall be given effect to in isolation and divorced from the Government orders is fallacious."

No doubt, administrative instructions, circulars and orders cannot override the statutory rules. It is also a settled principle of law that a draft rule cannot supplant existing rules. (See ***Union of India v. V. Ramakrishnan*** {(2005) 8 SCC 394}. Though the learned counsel for the petitioners emphasised the above point and argued for the position that the draft rule is still not ripe to replace the notified rule and has not become part of the statute book, I think, the facts of this case are distinguishable and the above proposition as such will not apply to this case. In my view the dictum laid down in Ramakrishnan's case (supra) and that in Sant Ram Sharma's case (supra) will come to be applied without doing violence to each other. Hence, the point for consideration is whether that part of the impugned Govt. Order which attempts to fill up a gap in the Special Rules by providing that vacancies remaining

unfilled in category 1 or category 3 can be filled up by candidates selected for direct recruitment, suffers from any jurisdictional defect. According to me, the Government Order only supplement the Special Rules and does not alter or modify the Special Rules. The Special Rules as well as the impugned part of the Govt. Order can co-exist. The gap in the Special Rules has been filled up without affecting the rights of Junior Superintendents to be selected and appointed by the method prescribed for category 1. In this context it is significant to note that the petitioners who belong to the third category also want a share in the vacancies remaining unfilled for want of qualified and selected candidates belonging to the category of Junior Supdts. under item 1. If the Government concedes the above demand, the petitioners will be the beneficiaries of such a Govt. Order. This would imply that the contention taken on the score of jurisdictional defect does not have much force. I am of the view that pending finalisation and publication of the proposed amendment to the Special Rules, it is competent for the Government to fill up the vacancies or posts remaining unfilled for want of sufficient number of qualified

Junior Supdts. under item No. 1 by the method prescribed in Govt. Order dated 16-3-2005.

21. The next contention, namely, that vacancies in item 1 shall not be exclusively filled up by direct recruitment, because it will violate the doctrine of equality, has no merit. Candidates from open market and in-service candidates belonging to certain specified categories cannot be treated as equals. The degree of competition among the candidates belonging to the above mentioned categories has no comparison. Hence, based on the mere fact that direct recruits as well as in-service candidates have to undergo the same selection process and pass the same written test, will not make them equal in all respects. In fact, all candidates who appeared for the above test are not included in the same part of the rank list. The rank list comprises three parts. It cannot be said that rank No. 2 in part II and rank No. 1 in Part III possess equal merit. There will be tight competition among direct recruits because of the large number of candidates who appear for the test and compete for getting selected. Members of the service who come under item No. 3 are entitled to stake a claim against

one third of the vacancies of the cadre strength. But there is no vested or accrued right in them to claim vacancies arising in category 1. Government have the competence to formulate the policy relating to the method of appointment, qualifications, etc. for the post. In exercise of the above power it has also got the authority to lay down the ratio or percentage of vacancies to be set apart for different categories. It is open to the Government to set apart a higher percentage of vacancies for direct recruits and lesser percentage for in-service candidates and vice versa. Hence, there is nothing illegal or unconstitutional about the manner in which the Government proposes to appoint candidates selected under the direct recruitment quota to fill up the vacancies remaining unfilled under item 1.

22. The last contention is that the Government have gone back from their promise made earlier to apportion the vacancies in such a manner that those coming under item 3 also will have a share in the vacancies. I am unable to accept the above contention. Even assuming that what was stated earlier is tantamount to a promise, the doctrine of promissory

estoppel is not attracted to the facts of this case, for the simple reason that the petitioners cannot validly contend that they have done anything in pursuance of or acting upon such promise.

23. In the result, the reliefs prayed for by the petitioners are declined.

W.P.(C) No. 27952 of 2006

24. The petitioner applied for appointment to the post of Divisional Accountant under the direct recruitment quota pursuant to notification issued by the P.S.C. In the rank list published on 23-2-2004 she is rank No. 18. She belongs to Muslim community and on that basis she says that she is likely to be advised for appointment if vacancies remaining unfilled for want of qualified Junior Supdts. are also reported to the Commission. In the counter affidavit filed by the Commission in W.P.(C) No. 14455 of 2005, it is stated that the Commission had received Govt. letter dated 19-4-2005 reporting 44 vacancies with a request to advise candidates against those vacancies.

25. In the light of the findings entered by me while answering the points for consideration in W.P.(C)

No. 14455 of 2005 and connected cases, the respondent-Commission has to advise direct recruitment candidates against 44 vacancies of Divisional Accountants reported in Govt. letter dated 19-4-2005. This shall be done as early as possible if not already done.

26. In the result, W.P.(C) Nos. 14455, 13978 & 18518 of 2005 are dismissed and W.P.(C) No. 27952 of 2006 is allowed, as above.

K.K. DENESAN
JUDGE

jan/